Editor's note: Reconsideration and request for oral argument denied by order dated March 14, 1973

DOROTHY M. LONG

IBLA 70-637 Decided October 3, 1972

Appeal from decision (AR-033165) by Phoenix, Arizona, land office, Bureau of Land Management rejecting Mining Claims Occupancy Act application.

Affirmed.

Mining Occupancy Act: Principal Place of Residence

> In an application under the Mining Claims Occupancy Act, it is within the discretion accorded to the Department to require that corroborative evidence be presented as to the facts of residence, and failure to present such evidence is reason for denial of the application where the facts of record do not support the conveyance. 30 U.S.C. § 702, 43 CFR 2550.0-5 (1972).

Mining Occupancy Act: Generally

> The purpose of the Mining Claims Occupancy Act is to permit certain persons, whose mining claims have been invalidated or relinquished, to continue to reside in their long established homes, but the Act was not intended to allow a claimant to acquire an interest thereunder and also to retain or convey to another an existing mining claim in the same property. 30 U.S.C. § 701, 702 (1970).

Mining Occupancy Act: Conveyances

> If an applicant under the Mining Claims Occupancy Act thereafter conveys to another an interest in an overlapping mining claim to the same property, the application may be denied despite allegation of an oral conditional promise by the claim owner to relinquish the portion of the claim which includes the occupancy site, when and if the occupancy application is approved. 30 U.S.C. § 701 (1970).

APPEARANCES: Tognoni and Pugh, by Hale C. Tognoni, Esq., William N. Hackenbracht, Esq., for appellant.

OPINION BY MR. GOSS

Dorothy Meyer Long has appealed to the Director, Bureau of Land Management 1/ from a decision dated May 11, 1970, in which the Phoenix, Arizona, land office, Bureau of Land Management, rejected her application AR-033165, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. § 701-709 (1970). Section 701 reads in part:

> The Secretary of the Interior may convey to any occupant of an unpatented mining claim which is determined by the Secretary to be invalid an interest, up to and including a fee simple, in and to an area within the claim of not more than (a) five acres or (b) the acreage actually occupied by him, whichever is less. The Secretary may make a like conveyance to any occupant of an unpatented mining claim who, after notice from a qualified officer of the United States that the claim is believed to be invalid, relinquishes to the United States all right in and to such claim which he may have under the mining laws. Any conveyance authorized by this section, however, shall be made only to a qualified applicant, as that term is defined in section 702 of this title, who applies therefor within the period ending June 30, 1971, and upon payment of an amount established in accordance with section 705 of this title.
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> * * * * * * *

On May 27, 1964, appellant first filed an application to purchase a portion of the Little Myra mining claim located in Sec. 26, T. 13 N., R. 2 W., G.S.R. Mer., within the Prescott National Forest, Yavapai County, Arizona. Appellant alleged in her application that the claim was originally acquired by her former husband, Edward H. Meyer, August 31, 1933, and that she acquired her interest in the claim by a divorce decree of March 27, 1951.

The Little Myra placer mining claim was declared null and void by a decision of the Phoenix land office, dated December 13, 1963. The same lands were then relocated as the Alice Caroline placer claim by S. A. Clyde and Pearl Clyde (appellant's brother and mother) and

1/ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management to the Board of Land Appeals, effective July 1, 1970, Cir. 2273, 35 F.R. 10009, 10012.

as the Alice Caroline No. 2 lode claim by S. A. Clyde on December 20, 1963, and then subsequently quitclaimed to Dorothy Meyer Long.

Appellant's first application under the Mining Claims Occupancy Act was rejected by a decision of the Phoenix land office, dated September 29, 1964. The decision included a finding that appellant had not relinquished her outstanding overlapping claims and stated that the application was rejected "without prejudice to the applicant filing an application on a subsequent date provided she relinquishes all interest in and to the claims set forth above." The decision allowed appellant a 30-day period in which either to relinquish the claims or to appeal to the Director of the Bureau of Land Management. No action was taken within the 30-day period and no appeal filed. Therefore, when the case was closed on the Bureau's records November 16, 1964, the Bureau's decision was the Department's final administrative ruling on this matter.

The record contains a lengthy history of overlapping and repetitive filings on the land of various types of mining locations by appellant and members of her family. 2/ When appellant filed her

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2/ The following summary was prepared by the Arizona land office and attached to its decision of May 11, 1970:

"The Little Myra was originally located in the Groom Creek Mining District by R. F. Rorick July 1, 1925 as a lode. R. F. Rorick quit claimed the Little Myra to Floyd Mockler and Connie Mockler April 7, 1928 and they quit claimed it to Edward Meyer and Dorothy C. Meyer on January 1, 1929.

"Dorothy Meyer Long received title to the claim in the Decree of Divorce dated March 27, 1951 from Edward H. Meyer which is recorded in Book 719, page 411 of Maricopa County Records.

"On August 7, 1962, the Little Myra was amended to a placer to conform to the type of mineral thereon and 60 acres were added. Three locators were also added, William Long, Pearl Clyde and Sam Clyde. On August 31, 1962 the Little Myra was amended to include only 40 acres. On July 3, 1963 the Forest Service ordered adverse proceedings (Contest 10576) against the Little Myra Placer Claim and complaint was issued July 9, 1963. Dorothy Meyer Long failed to answer and a decision dated December 13, 1963 issued by the Manager of the land office declared the claim null and void. Previously, on February 19, 1963. Dorothy Meyer Long filed application under the Mining Claims Occupancy Act for a portion of the Little Myra placer. Action on the application was delayed pending the correction of certain deficiencies in the application. On December 20, 1963, the Alice Caroline No. 2 lode was located by S. A. Clyde, brother of Dorothy Meyer Long, and on the same date, the Alice Caroline placer (formerly the Little Myra placer) was located by S. A. Clyde and Pearl Clyde.

second Mining Claims Occupancy Act application on September 14, 1967, various of these family mining claims were outstanding.

Appellant's second application was originally rejected on March 5, 1969, because "applicant has not furnished the dates she actually resided on the land with corroborating statements from witnesses, although numerous attempts have been made by this office to obtain this information." Appellant was allowed 30 days to file the evidence. Pursuant to appellant's requests, this period was extended some three times, but detailed corroborating evidence has not been received.

On May 11, 1970, the land office again rejected appellant's second application, concluding that she was not a qualified applicant under the Act because (1) she was not a residential occupant owner of valuable improvements on an unpatented mining claim on October 23, 1962, (2) the improvements and the site have only been and are now used intermittently for such purposes as weekend occupancy or for vacations of short duration, and (3) unpatented mining claims are now on the land that have neither been invalidated nor relinquished. The land office decision relied in part upon a field investigation report of the Forest Service, U.S. Department of Agriculture.

(fn. 2 cont.)

"On September 29, 1964, the Land Office Manager rejected the Mining Claim Occupancy application for failure of the applicant to divest herself of all interest in the claims on which the application was based. On August 6, 1965 the Forest Service requested adverse proceedings be instituted against the Alice Caroline No. 2 lode and Alice Caroline Placer Mining Claim (AR 035182). Complaint was issued August 19, 1965 and the claims were subsequently declared null and void by Hearing Examiner's decision of February 24, 1966. This decision was appealed but before the issue was settled, Dorothy Meyer Long relocated the ground January 24, 1966 as the Dorothy Lode and Dorothy Placer mining claims. The Director affirmed the Hearing Examiner's decision of February 24, 1966 on April 17, 1967. On June 14, 1967 an appeal to the Secretary was filed. Again, before this issue was settled, Pearl Clyde, mother of Dorothy Meyer Long, located the Little Pearl lode and Little Pearl placer mining claims on July 17, 1967. Dorothy Meyer Long again filed Mining Claim Occupancy application on September 14, 1967 for these same lands.

"On February 28, 1968, the Secretary subsequently affirmed the Director's decision of April 17, 1967, declaring the Alice Caroline lode and Alice Caroline placer mining claims null and void. Pearl Clyde died in early 1969 in Phoenix, Arizona. S. A. Clyde also died in 1969 prior to Pearl Clyde's death. Dorothy Meyer Long presumably is the sole heir to her mother, Pearl Clyde."

It will be noted that the previous sentence is apparently in error, Dorothy Lee being a granddaughter of Mrs. Pearl Clyde.

Appellant takes issue with the land office's conclusions and contends that she has proved use of the Little Myra mining claim as one of her principal places of residence since 1933; and that to give up the Little Myra claim after 17 years would work a great hardship on her. Appellant, citing 30 U.S.C. § 701 et seq., Departmental regulation 43 CFR 2215.0-5 (1970), now 43 CFR 2550.0-5 (1972), and various excerpts from the legislative history of the Act, maintains that she is a qualified applicant.

Appellant's submissions are in conflict with the findings of the Forest Service as to the land being a principal place of residence under 30 U.S.C. § 702. That section reads:

> § 702. "Qualified applicant", defined
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> For the purposes of this chapter a qualified applicant is a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

Appellant bears the burden of proving that the land applied for was a principal place of residence during the entire required seven-year period. Henry P. and Leoda M. Smith, 74 I.D. 378 (1967). It was within the discretion accorded to the Department to require that an applicant present corroborative evidence as to residence. In the supplementary material submitted by appellant, there is little detailed-information as to the nature and extent of use and occupancy during the first three years of the critical seven-year period - despite the fact that appellant's second Occupancy Act application was first rejected for this reason.

There are additional reasons for sustaining denial of the application. Appellant's actions have not been in conformity with the purpose of the Act or the intent of the limitation imposed in her 1964 decision. 30 U.S.C. § 701, supra, permits the Secretary in his discretion and under specified conditions to make a conveyance (1) when an unpatented mining claim has been determined invalid or (2) when an occupant, after notice that the claim is believed to be invalid, relinquishes all right in and to such claim which he may have under the mining laws.

In Funderberg v. Udall, 396 F.2d 638 (9th Cir. 1968), the purpose of the Mining Claims Occupancy Act was discussed at p. 640:

> * * * The Hearings S. Committee of Interior and Insular Affairs, S. 3451, 87th Cong., 2d Sess. (1962), pp. 11-12, U.S. Code Congressional and Administrative News 1962, p. 1326, show that the Act of October 23, 1962, was a statute to relieve the hardship which would be visited upon persons who were living on their unpatented claims, but would be evicted under the 1955 statute, supra, and would "have no place to go" if the relief proposed in the 1962 bill was not granted. The plaintiff's situation did not fall within either the letter or the purpose of the 1962 statute. (Emphasis added.)

In 1964, appellant was informed by land office order that she must relinquish her Alice Caroline placer claim and Alice Caroline No. 2 load claim before filing a new application for an occupancy conveyance. Appellant failed to relinquish the two claims until September 14, 1967. Apparently she did not otherwise withdraw her appeal from an earlier decision ruling the claims null and void, so that the appeal was denied and the claims finally adjudged void on February 28, 1968. Meanwhile, overlapping mining claims continued to be filed by appellant and her family.

The Little Pearl lode and Little Pearl placer claims were filed by appellant's aged mother July 17, 1967. In her statement of reasons of August 10, 1970, appellant represents that she would be willing to relinquish all right in and to these claims "which she may have inherited from her mother, Pearl Clyde" if the Forest Service agrees to the occupancy conveyance. In an amended statement of reasons filed January 24, 1972, appellant alleges instead that her niece, Dorothy Lee, inherited the claims, and would relinquish her interests only if appellant's application is granted. On August 25, 1972, appellant's counsel stated that appellant and Dorothy Lee inherited the claims, but that they have an oral agreement whereby appellant has given her rights under the claims to Dorothy Lee, and Dorothy Lee has agreed to release the five acres whereon the building is located in the event appellant is granted the tract by the Government. Appellant remained the owner of record at least past August 25, 1972. Her counsel then stated that the oral agreement will be reduced to writing.

This matter has been on appeal since 1970, and no written relinquishment or promise of relinquishment from Dorothy Lee has been produced. During at least the substantial part of the period, the position of appellant has been identical to that which was ruled against in 1964--i.e., as an owner or part owner of record of an

unrelinquished mining claim at the same time she seeks conveyance under the Mining Claims Occupancy Act.

Appellant has submitted no compelling reason for her continuing failure to comply with intent of the 1964 relinquishment requirement. If the 1964 order--instead of requiring relinquishment of the Alice Caroline placer and Alice Caroline No. 2 lode claims as conditions precedent to the filing of a new Occupancy Act application--had specified relinquishment of all present and future claims on the applied for occupancy site, then appellant would have been barred by the doctrine of finality of administrative action. Gabbs Exploration Co., 67 I.D. 160 (1960) aff'd in Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D. C. Cir. 1963), cert. den. 375 U.S. 822 (1963).

30 U.S.C. § 707 provides that in any conveyance under the Mining Claims Occupancy Act the mineral estate is reserved to the United States. It would defeat the purpose of the Mining Claims Occupancy Act to allow a claimant to acquire an occupancy interest and, at the same time, to retain or transfer an existing claim to mineral rights in the land. See Walter L. Hurlburt et al., 7 IBLA 255 (1972). Further, 43 CFR 2551.1 (1972), formerly 43 CFR 2215.1, provides that the holder of a claim that has not been invalidated may petition for a United States officer to state whether he believes the claim to be invalid. Apparently no such petition has been filed in connection with the Little Pearl lode or the Little Pearl placer claim.

Appellant has not shown that the land office improperly exercised its discretion in denying the conveyance. The history of the claims and the misleading statements set forth above are inconsistent with the orderly administration of public lands. See Gabbs Exploration Co., supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

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Joseph W. Goss, Member

We concur:

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Frederick Fishman, Member

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Edward W. Stuebing, Member